Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-452-01
BJLaterman

date: MAR 22 2001

to: Team Manager, Group 1653
Stoneham, MA

from: Associate Area Counsel, Boston
CC:LM:FSH:BOS

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subject: [redacted]
Form 872
Taxable Years [redacted] through [redacted]

This is in response to your request that we provide advice regarding extending the statute of limitations for the above-mentioned consolidated group's taxable years [redacted] through [redacted], for the restricted purpose of considering claims for refund due to additional FSC commission deductions.

We have reviewed all the documents you have provided. [redacted] (Old [redacted]) ([redacted] is a Delaware corporation. It was the parent corporation of an affiliated group of corporations which filed a consolidated return for each of the above-mentioned taxable years. [redacted], now known as [redacted] (New [redacted]) ([redacted] is also a Delaware corporation which is the parent corporation of an affiliated group of corporations.

Old [redacted] was acquired by [redacted], in a tax free reorganization in [redacted]. Pursuant to the Agreement and Plan of Merger, Old [redacted] was merged with and into [redacted]. with [redacted]. as the surviving corporation renamed [redacted]. After the merger the former Old [redacted] shareholders owned [redacted]% of the equity value of the combined company. The merger was upon the terms and subject to the conditions set forth in the Agreement and Plan of Merger and in accordance with Delaware law.

You are presently considering claims for refund for additional FSC commission deductions as a result of taxpayer initiated redeterminations and adjustments to the foreign trading gross receipts of taxpayer's [redacted] and [redacted] devisions. These claims have an effect upon the returns of the taxpayer's

foreign sales corporation, [redacted]
These claims were filed within the time period provided for in Temp. Reg. § 1.925(a)-1(T)(c)(8)(i) as amended by T.D. 8764, I.R.B. 1998-15, 9 and Notice 99-24, I.R.B. 1999-20, 74 and at a time when both the statute of limitations for Old [redacted] and [redacted] were both open. Exam extended the statute of limitations for Old [redacted]'s [redacted] through [redacted] taxable years to [redacted] and for the foreign sales subsidiary, [redacted], to [redacted], [redacted]. The taxpayer wishes to extend the statute for Old [redacted] to correspond to the extension for [redacted] Exam has extended until the end of [redacted] but wants to restrict any further extensions to foreign commission expenses; i.e, to preclude any additional claims resulting from redetermining the grouping of transactions.

The extensions obtained by Exam for Old [redacted] have been solicited from [redacted] as successor in interest by merger to [redacted]. Exam proposes to restrict any further consents by use of the following language.

> "This agreement is limited to the tax effect resulting from any increase or decrease in the commission expense payable to it foreign sales corporation, [redacted]. ([redacted]) other than any amount resulting from an election to group, to change group, to change a grouping basis, or to change from a grouping basis to a transaction-by-transaction basis (collectively "grouping redeterminations") as defined in Temp. Treas. Reg. § 1.925(a) - 1T(c)(8)(i), as amended by T.D. 8764".

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name in all matters related to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its name will give waivers, and any waiver so given, shall be considered as having also been given or executed by each subsidiary. Treas. Reg. § 1.1502-77(a). Thus, generally the common parent is the proper party to sign consents, including the Form 872 waiver to extend the period of limitations, for all members in the group. Treas. Reg. § 1.1502-77(a). Treas. Reg. § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect to the tax for a

consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. § 1.1502-77T provides exceptions to the general rule. Temp. Reg. § 1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case. Temp. Reg. § 1.1502-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group.

Subparagraph (a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice or waiver applies. In this case, the common parent, Old [redacted] was merged into [redacted] now known as New [redacted], in [redacted] and is no longer in existence. Therefore, this paragraph does not apply.

Subparagraph (a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. I.R.C. § 381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. § 361 (relating to non recognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph (A), (C), (D), (F) or (G) of I.R.C. § 368(a)(1). In [redacted], Old [redacted] merged into [redacted], with [redacted] surviving. If the merger is an "A" reorganization, I.R.C. § 381 will apply to the merger. If so, pursuant to Temp. Reg. § 1.1502-77T(4)(ii), [redacted], now known as New [redacted], would be an alternative agent for the Old [redacted] consolidated group for the tax years [redacted] through [redacted].

Any waiver given by New [redacted] with respect to those pre-merger years of the Old [redacted] consolidated group would be deemed to be given by the agent of the group. We know that it was intended that the merger qualify as a tax free reorganization under I.R.C. § 368(a). However, we do not know whether the requirements of I.R.C. § 368(a)(1)(A) have been met. Accordingly, we do not believe it would be in the best interests of the Service to rely upon this subparagraph in this case.

Subparagraph (a)(4)(iii) of Temp. Reg. § 1.1502-77T lists as an alternative agent the agent designated by the group under Treas. Reg. 1.1502-77(d). Treas. Reg. § 1.1502-77(d) provides that if the common parent corporation dissolves, the common parent and/or the remaining members of the consolidated group may designate another member of the group to act as agent, subject to the approval of the District Director. In this case, we assume that the common parent and/or remaining members of the Old [redacted] consolidated group did not designate another member of the group to act as agent. Accordingly, subparagraph (a)(4)(iii) does not apply.

Subparagraph (a)(4)(iv) of Temp. Reg. § 1.1502-77T lists as an alternative agent, the common parent of the group at the time the waiver is given if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3). In this case, there is no "F" reorganization or downstream transfer as described in Treas. Reg. § 1.1502-75(d)(2). Therefore, we will only consider whether Treas. Reg. § 1.1502-75(d)(3) applies in this case.

Treas. Reg. § 1.1502-75(d)(3)(i) provides that if a corporation (the first corporation) or any member of a group of which the first corporation is the common parent acquires the stock of another corporation (the second corporation) and as a result the second corporation becomes a member of a group of which the first corporation is the common parent, or substantially all the assets of the second corporation, and the stockholders (immediately before the acquisition) of the second corporation, as a result of owning stock of the second corporation, own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the first corporation, then any group of which the first corporation was the common parent immediately before the acquisition shall cease to exist as of the date of acquisition, and any group of which the second corporation was the common parent immediately before the acquisition shall be treated as remaining in existence, with the first corporation becoming the common parent of the group.

In applying the 50 percent ownership test, the question is whether the shareholders of Old [redacted] (immediately before the acquisition), as a result of owning stock in Old [redacted], own (immediately after acquisition) more that [redacted] percent of the fair market value of the outstanding stock of [redacted], now known as New [redacted]. If this is the case and the transaction in this case was pursuant to a plan of acquisition of the stock

or assets of Old [redacted] then the transactions would constitute a reverse acquisition. The Old [redacted] consolidated group would be treated as remaining in existence, with [redacted], now known as New [redacted], becoming the common parent of that group. If the transaction constituted a reverse acquisition, then pursuant to Temp. Reg. § 1.1502-77T(a)(4)(iv), New [redacted] would be the alternative agent for the Old [redacted] consolidated group for the tax years [redacted] through [redacted], and any waiver given by New [redacted] with respect to the pre-merger tax years of the Old [redacted] consolidated group would be deemed to be given by the agent of the group.

In this case, the shareholders of Old [redacted] received approximately [redacted]% of the value of the combined company as the result of the merger. Therefore, the transaction constitutes a reverse acquisition. Accordingly, subparagraph (iv) does apply and New [redacted] is the alternate agent for the Old [redacted] consolidated group for the taxable years [redacted] through [redacted].

Both Old [redacted] and New [redacted], formerly [redacted], [redacted], are Delaware corporations. In this case since the merger of Old [redacted] and [redacted], was effected under Delaware law, New [redacted] is primarily liable for Old [redacted]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771 (1988). Section 259 of the Delaware General Corporation Law provides in part,

> (a) When any merger or consolidation shall become effective under this chapter, ... all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, § 259 (1991).

Accordingly, New [redacted] is a successor in interest by merger to Old [redacted].

Based on the foregoing discussion, we recommend that you obtain a Form 872 from New [redacted] both as alternate agent and as successor in interest to Old [redacted]. The caption on the form 872 should read: [redacted] (EIN) formerly known as [redacted]. (EIN) successor in interest by merger to [redacted] (EIN) and alternate agent for the [redacted] (E.I.N.) consolidated group. On the bottom of the form, you should add the following: *This relates to the joint and several liability for the tax of the [redacted] (E.I.N.) and [redacted] consolidated group for its taxable years [redacted] through [redacted].

This Form should be signed by an authorized officer or director of New [redacted]. Rev. Rul. 83-41, 1983 C.B. 399, clarified and amplified by, Rev. Rul. 84-165, 1984-2 C.B. 305.

In addition, under I.R.C. § 6901, New [redacted] is a transferee at law of Old [redacted] because New [redacted] received the assets of Old [redacted] when Old [redacted] merged into [redacted]. A determination against the surviving corporation for tax due by the merged corporation for a period prior to the merger is not generally handled as a transferee case, rather it should generally be handled by asserting primary liability against the surviving corporation. There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM (35)(10)61. Therefore, it is preferable to assert primary instead of transferee liability against the surviving corporation, New [redacted], since the statutory period for assessing a deficiency has not expired under primary liability. The transferee liability approach should be reserved for the situation where time for asserting primary liability has expired.

With regard to restricting the consent, we note that the Service has published final regulations (T.D. 8944) that provide guidance to taxpayers who elect to be treated as foreign sales corporations. T.D. 8944 is effective March 2, 2001 and adopts with modifications the temporary and proposed regulations (T.D. 8764; REG - 102144-98) published on March 3, 1998. New FSC Regulation § 1.925(a) - 1(c)(8)(i), issued by T.D. 8944 (issued March 6, 2001), extends the time limit for making FSC grouping redeterminations. The new Regulation provides that a grouping redetermination for pre-2000 taxable years may be made no later than the due date of the FSC's timely filed (including extensions) tax return for its year beginning on or after January 1, 2001 (a date likely to mean September 15, 2001 in this case). A printout of Tax Notes' version of the new Regulation is attached to this memorandum. Therefore, any restriction of the rights granted by the new Regulation may be rejected by the taxpayer.

In the event that the taxpayer agrees to restrict its rights for making FSC grouping redeterminations, the restricted consent language you propose to use must be changed. The phrase "as defined in Temp. Reg. § 1.925(a) -1T(c)(8)(i) as amended by T.D. 8764 "should be changed to "as referred to in Treas Reg. § 1.925(a) - 1(c)(8)(i) issued by T.D. 8944, issued March 6, 2001." This change refers to the new Regulation and more accurately reflects what is reflected in said Regulation section; i.e, it allows the administrative pricing methods to be applied on the basis of groups consisting of products or product lines (instead of on a transaction-by-transaction basis) at the election of the taxpayer. Aside from this change, we have no objection to the proposed language.

If we can be of any further assistance, the undersigned can be reached at (617) 565-7838.

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